FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 344

O. V. KESSLER,
Petitioner,

v.

THOS. P. MCGLONE, SR., Executor, Fauquier National Bank, Administrator, C.T.A. of the Estate of Rose Meredith Kessler, Deceased; THOMAS F. MCGLONE, ROBERT MCGLONE, THOMAS F. MCGLONE, JR., MABEL MCGLONE, EDWARD B. MCGLONE, and AGNES J. KERR,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MARCUS BORCHARDT,
Counsel for Petitioner.

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

The Petitioner for a Writ of Certiorari, respectfully represents to this Honorable Court as follows:

A

SUMMARY STATEMENT OF THE MATTER INVOLVED

On February 5, 1946, Rose Meredith Kessler, now deceased, and a bona fide resident of the State of Virginia,

proceeded to the State of Florida for the sole purpose of obtaining a divorce from O. V. Kessler, the petitioner herein. Thereafter, on May 10, 1946, the said Rose Meredith Kessler filed suit for divorce against her husband, the said O. V. Kessler, in Dade County, Florida, without serving notice of said suit on the petitioner at his last known address, and the said petitioner had no notice whatsoever of the filing of said suit, prior to the hearing of said cause.

On July 17, 1946, without the petitioner's participation in the proceedings, in any manner whatsoever, a final decree of absolute divorce was granted the said Rose Meredith Kessler in Dade County, Florida (R. 133), and three days thereafter the said Rose Meredith Kessler left Florida and returned to her home in Gainesville, Virginia.

Rose Meredith Kessler died on February 7, 1947.

Thereafter a suit was filed by the petitioner against the respondents herein in the Circuit Court of Prince William County, State of Virginia, to have by way of curtesy interest in the estate of the said deceased. A special plea was filed by the respondents alleging that the petitioner had no standing in the litigation, on the ground that on July 16, 1946, the said Rose Meredith Kessler had obtained a divorce from the petitioner in Dade County in the State of Florida.

Thereupon a replication was filed by the petitioner and the validity and operative effect of the Florida judgment, thus, was put in direct issue.

The Circuit Court of Prince William County upheld the validity and operative effect of the Florida decree for divorce and ruled adversely to the interest of the petitioner R. 97).

Thereupon your petitioner sought a review of said ruling in the Supreme Court of Appeals of Virginia at Richmond through appeal, and on June 15, 1948, an order was entered in the Supreme Court of Appeals of Virginia denying the application for a review of the ruling of the Circuit Court of Prince William County (R. 99).

B

STATEMENT AS TO JURISDICTION

This case is within the jurisdiction of this Court under Title 28, Sections 2101c and 1257 (3) of the U. S. C., the Supreme Court of Appeals being the court of highest jurisdiction in the State of Virginia. An order of this Court extending time to October 13, 1948, to file the present petition was entered on September 1, 1948 (R. 162).

The petitioner contends that denial of a review by the Supreme Court of Appeals of Virginia and affirmance of the judgment below of the matters herein involved was contrary to the law as expressed by this Honorable Court.

C

QUESTIONS PRESENTED

The questions presented here are:

1. Does the Full Faith and Credit Clause of the Constitution apply in a case where the petitioner has not had his "day in court", prior to the entry of a judgment in a divorce suit, and wherein the petitioner received no notice of the institution of the suit at his last known address, and thus was precluded from protecting his rights and interest.

2. Does the Full Faith and Credit Clause of the Constitution apply in a case where the petitioner has not participated in any manner whatsoever in divorce proceedings instituted in a foreign state, wherein participation was held to be a prerequisite to the validity of the decree, under the decisions of this Court.

D

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

In denying the petitioner a review of the judgment of the Circuit Court of Prince William County wherein an invalid

Florida decree for divorce was upheld, and in failing to reverse the erroneous ruling of the lower court, the Supreme Court of Appeals of Virginia decided a question contrary to and not in accord with the applicable decisions of this Court.

The matter herein is of extreme importance, and the law applicable should be clarified so as to bring a uniformity in divorce decrees obtained in foreign states.

WHEREFORE, your petitioner respectfully prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

MARCUS BORCHARDT,
Counsel for Petitioner.

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Respondents

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

ORDER OF THE COURT BELOW

The order of the Supreme Court of Appeals of the State of Virginia which disposed of this case, is printed in the record (R. 99).

II

JURISDICTION

(1) The jurisdiction of this Court is invoked under Title 28, Sections 2101 c and 1257 (3) of the U. S. C. and an order of this Court extending the time to October 13, 1948, to file the present petition was entered on September 1, 1948 (R. 162). The specific claims as to the jurisdiction of this Court are set out in the foregoing petition under the heading "B" and are not repeated here.

(2) The judgment of the Supreme Court of Appeals of the State of Virginia sought to be reviewed was rendered June 15, 1948 (R. 99). This judgment affirms the judgment of the Circuit Court of Prince William County (R. 97).

III

STATEMENT OF CASE

The essential facts of the case are given under the heading of "A" in the foregoing petition and in the interest of brevity are not repeated here. Any necessary elaboration of the facts on the points involved will be made in the course of the argument which follows.

IV

SPECIFICATION OF ERRORS

It is respectfully submitted that the Supreme Court of Appeals of the State of Virginia erred:

1. In denying to your petitioner a review of the judgment of the Circuit Court of Prince William County.

2. In failing to reverse the judgment of the Circuit Court of Prince William County whereunder a divorce decree obtained in the State of Florida was erroneously held valid and operative.

3. In failing to reverse the judgment of the Circuit Court of Prince William County, on the ground that the petitioner

did not have his "day in court" in the matters involved herein.

4. In failing to reverse the judgment of the Circuit Court of Prince William County which erroneously considered the divorce decree obtained in the State of Florida as *res judicata* herein, although under the decisions of this Court, the Florida divorce decree is invalid and not operative herein.

V

ARGUMENT

(a) Summary of Argument

The chief points presented herein are as follows:

The petitioner has not had his "day in court" in the Florida proceedings as notice of the institution of the divorce proceedings in Florida was not served upon him at his last known address, and he therefore was not in a position to protect his rights and interests.

The Florida divorce proceedings are not *res judicata* herein and the Full Faith and Credit Clause of the Constitution therefore does not apply, as the petitioner did not submit himself to the jurisdiction of the Florida Court, and in no wise did he participate in the Florida divorce proceedings.

(b) Failure to Serve Petitioner With Notice of the Institution of the Florida Divorce Proceedings at His Last Known Address Denied Him His "Day in Court".

At the hearing in the Circuit Court of Prince William County it was developed that the petitioner was not served with a notice of the institution of the divorce proceedings in Florida (R. 73); that the petitioner resided at 5719 Third Street South, Arlington, Virginia, from January, 1946, to the date of the hearing, and that Rose Meredith Kessler had full knowledge of the petitioner's said perma-

nent address when she left Virginia for Florida; that the petitioner received letters from the said Rose Meredith Kessler at said address, postmarked Gainesville, Virginia, as late as January 17, 1946; January 19, 1946, and January 25, 1946 (R. 137, 138), and that she did not leave Virginia for Florida until February 5, 1946 (R. 78).

The record in this cause shows that paragraph 1 of the Bill of Complaint for Divorce filed in Florida by the late Rose Meredith Kessler (R. 102), falsely set forth that the defendant (the petitioner herein) "is a resident of Washington, District of Columbia", and further shows that the Order for Publication was enclosed in an envelope addressed to "Oliver V. Kessler, Washington, D. C.", with a notation (R. 111):

> "Not in Phone Directory
> Returned to Sender
> Unclaimed from Washington, D. C."

and that no attempt was made to contact him at his home in Virginia.

The said Rose Meredith Kessler had it within her power to see that proper notice of the institution of the Florida proceedings on May 10, 1946, was served upon her husband. However, she preferred perpetrating a fraud upon the petitioner and the Florida Court in this respect, in order to proceed in the simulated divorce proceedings without any opposition whatsoever.

In upholding the validity of the divorce decree, the Trial Court stated:

> "It is true that there might be some question raised—and it seems to me that that is about the only real question that can be raised, in view of the notice of the Court in this State—about the lack of notice given to Mr. Kessler insofar as disclosing his address, if she knew it. She made an affidavit to the effect that she did not know it." (R. 89)

97

When the Full Faith and Credit Clause of the Constitution was promulgated (Art. IV, Sec. 1) and the congressional legislation enacted thereunder, it was not intended that a judgment fraudulently obtained in one state should be honored and considered *res judicata* in another state, as most assuredly in such a case, the person against whom a judgment is rendered has not had his "day in court".

(c) The Fact That the Petitioner Did Not Enter a General Appearance in the Florida Divorce Proceedings, Nor Participate in Said Proceedings in Any Manner Whatsoever Precludes the Florida Judgment From Being Res Judicata in Another State and From Consideration Under the Full Faith and Credit Clause of the Constitution.

Although the fraud perpetrated upon the Florida Court and the petitioner, in the Florida divorce proceedings in the falsification as to service of notice as aforesaid, in itself, would be sufficient to preclude the recognition of the Florida divorce decree in the State of Virginia or in any other state—the fact that the petitioner did not enter his general appearance nor participate in the Florida proceedings in any manner whatsoever, brings the present case squarely within the applicable decisions that would deny its validity and operative effect in other jurisdictions.

In order to emphasize the error of the lower court in considering the Florida judgment as *res judicata*, specific attention is called to the fact that in the present case the petitioner did not enter a general appearance in the Florida divorce proceedings and in no wise participated in such proceedings prior to the entry of the Florida judgment.

In all of the cases wherein this Court has held the doctrine of *res judicata* as applicable in another state in divorce proceedings, under and by virtue of the Full Faith and Credit Clause of the Constitution, both principals in the divorce litigation appeared, were represented by counsel, offered testimony, and otherwise actively participated in such procedings.

In *Davis* v. *Davis*, 305 U. S. 32, decided in 1938, wherein an absolute divorce obtained in the State of Virginia was sustained, and the right to contest the domicile of the divorce in a supplemental proceeding was denied, the Court stated:

> "She may not say that she was entitled to sue for divorce in the state court, for she appeared there and by plea put in issue his allegation as to domicile, introduced evidence to show it false, took exceptions to the commissioner's report, and sought to have the court sustain them and uphold her plea."

The Court then stated, on page 43:

> "Considered in its entirety, the record shows that she submitted herself to the jurisdiction of the Virginia Court and is bound by its determination that it had jurisdiction of the subject matter and of the parties."

In *Stoll* v. *Gottlieb*, 304 U. S. 105, in commenting on the validity of a decree *where both parties have appeared and presented evidence*, the Court stated:

> "After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first."

In two cases decided by this Honorable Court as recently as June 7, 1948, *Sherrer* v. *Sherrer*, 68 Sup. Ct. Rep. 1087, and *Coe* v. *Coe*, 68 Sup. Ct. Rep. 1094, it definitely was held that in divorce proceedings where both principals appeared and actively participated, the doctrine of *res judicata* must be applied under the Full Faith and Credit Clause, and such adjudications are not susceptible to collateral attack. Conversely, *RES JUDICATA* SHOULD NOT APPLY, NOR SHOULD THE FULL FAITH AND CREDIT

CLAUSE APPLY, WHERE THERE HAS BEEN NO PARTICIPATION IN THE ORIGINAL PROCEEDINGS BY THE PRINCIPALS INVOLVED.

In the case of *Sherrer* v. *Sherrer, supra,* the petitioner challenged the validity of a divorce decree obtained by the respondent from petitioner in Florida *in a contested divorce suit.* A judgment for the petitioner was affirmed by the Supreme Judicial Court of Massachusetts, and when the matter was brought before this Honorable Court through a Writ of Certiorari, the judgment of the Massachusetts Court was reversed. In reversing the judgment this Court pointed out that the Full Faith and Credit Clause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent sovereign States into a nation, and if in its application local policy must at times be required to give way, the result is part of the price of our federal system; that full faith and credit must be given to divorce decrees rendered in "contested cases" by Courts in sister states no less than to other decrees.

The Court stated:

> "The respondent received notice by mail of the pendency of the divorce proceedings. He retained Florida counsel who entered a general appearance and filed an answer denying the allegations of petitioner's complaint, including the allegation as to petitioner's Florida residence.
>
> "On November 14, 1944, hearings were held in the divorce proceedings. Respondent appeared personally to testify with respect to a stipulation entered into by the parties relating to the custody of the children. Throughout the entire proceedings respondent was represented by counsel. Petitioner introduced evidence to establish her Florida residence and testified generally to the allegations of her complaint. Counsel for respondent failed to cross-examine or to introduce evidence in rebuttal.

> "The Florida court on November 29, 1944, entered a decree of divorce after specifically finding 'that petitioner is a bona fide resident of the State of Florida, and that this court has jurisdiction of the parties and the subject matter in said cause * * *' Respondent failed to challenge the decree by appeal to the Florida Supreme Court."

In discussing the Florida proceedings, the Court further stated (Sup. Ct. Rep. 1089):

> "The respondent personally appeared in the Florida proceedings. Through his attorney he filed pleading denying the substantial allegations of petitioner's complaint. It is not suggested that his rights to introduce evidence and otherwise to conduct his defense were in any degree impaired; nor is it suggested that there was not available to him the right to seek review of the decree by appeal to the Florida Supreme Court. It is clear that respondent was afforded his day in court with respect to every issue involved in the litigation, including the jurisdictional issue of petitioner's domicile. Under such circumstances, there is nothing in the concept of due process which demands that a defendant be afforded a second opportunity to litigate the existence of jurisdictional facts. *Chicago Life Insurance Co.* v. *Cherry*, 1917, 244 U. S. 25, 37, S. Ct. 492, 61 L. Ed. 966; *Baldwin* v. *Iowa State Traveling Men's Association*, 1931, 283 U. S. 522, 51 S. Ct. 517, 75 L. Ed. 1244."

Then, too, in the case of *Coe* v. *Coe, supra*, also decided on June 7, 1948, this Court stated:

> "Thus, here, as in the Sherrer case, the decree of divorce is one which was entered after proceedings in which there was participation by both plaintiff and defendant and in which both parties were given full opportunity to contest the jurisdictional issues."

It is again respectfully submitted, that it is of extreme importance to observe that in all of these cases, this Court

emphasized the fact that both the plaintiff and the defendant participated in the proceedings; conversely where there was not participation in the proceedings by both principals, it cannot be said that both of the parties has their "day in court".

In the present case, as herein repeatedly pointed out, the petitioner in no wise participated in the Florida proceedings. He did not enter a general appearance; nor did he file pleadings placing in issue the various matters he sought subsequently to contest in another court. He did not personally appear before the Florida Court, and give testimony; nor did he retain an attorney to represent him in said proceedings, all of which factors being of paramount importance in both of the leading cases—*Sherrer* v. *Sherrer* and *Coe* v. *Coe*.

VI

CONCLUSION

It is respectfully submitted that the action of the trial court in holding the Florida divorce decree to be valid and operative in Virginia—and the failure of the Supreme Court of Appeals of Virginia to review and reverse the judgment of said lower court, were erroneous, and in direct conflict with the law applicable herein, and that a Writ of Certiorari should be granted.

Respectfully submitted,

MARCUS BORCHARDT,
Counsel for Petitioner.